STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAX GERALD MEAD,

Defendant-Appellant.

UNPUBLISHED
March 16, 2004

No. 238754
Muskegon Circuit Court
LC No. 01-045774-FH

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

On February 21, 1999, without apparent motive, defendant stabbed both his 83-year-old neighbor and her black Labrador dog. In his defense, defendant claimed he was insane at the time the acts occurred. Following a bench trial, the trial court determined that defendant was mentally ill at the time of the offenses, but was legally sane. Defendant was convicted of assault with intent to murder, MCL 750.83, and animal torturing, MCL 750.50b. He was sentenced to 12 to 25 years' imprisonment and 1 to 4 years' imprisonment, respectively. Defendant appeals as of right. We reverse and remand for a new trial.

Defendant first argues that certain evidence and testimony were improperly admitted. This Court ordinarily reviews a trial court's decision regarding evidentiary matters for an abuse of discretion, but where the question involves a preliminary question of law our review is de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). This Court will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. *Id.*

Defendant asserts that allowing the prosecutor to use defendant's statements contained in various treating doctors' reports as substantive evidence that defendant was feigning insanity so that he did not have to go to prison was improper hearsay testimony. The statements were made while defendant was committed to the Kalamazoo Psychiatric Hospital, as he had been deemed incompetent to stand trial. Defendant concedes that the statements contained in the reports attributable to defendant are non-hearsay as statements by a party opponent, but argues that they were inadmissible because the doctors themselves did not testify at trial as to the statements. Thus, defendant is actually objecting to his statements being admitted through the reports in which they were contained. Plaintiff argues that the statements were admissible as presented under MRE 703 because defendant's expert witness, Dr. Lewis, relied on the reports in forming his opinion.

We first address the trial court's admission of Dr. Shazer's report as substantive evidence under MRE 703. Dr. Shazer's report was generated in regards to defendant's competency to stand trial, pursuant to MCL 330.2028. In *People v Dobben*, 440 Mich 679, 698; 488 NW2d 726 (1992), our Supreme Court held that such a report may be used by an expert in formulating an opinion as to the defendant's criminal responsibility. MRE 705 provides that an expert may be required to disclose the facts underlying his opinion on cross-examination, and MRE 703 provides that these underlying facts need not be otherwise admissible. Thus, an expert may base his opinion on hearsay. *Dobben, supra* at 695-696. Furthermore, MRE 703 provides that the court may require these facts to be in evidence.

However, the evidence on which an expert bases his opinion is not automatically admissible. It is within the court's discretion to admit these facts into evidence through the expert's testimony, subject to exclusion under MRE 403 if the trial court determines that its probative value is outweighed by considerations of unfair prejudice. *People v Robinson*, 417 Mich 661, 664-665; 340 NW2d 631 (1993). But defendant did not object at trial on prejudice grounds. In such a case, this Court has declined to disturb the trial court's ruling. *People v Caulley*, 197 Mich App 177, 195; 494 NW2d 853 (1992). Therefore, according to plaintiff's argument, the facts contained in Dr. Shazer's report were properly admitted under MRE 703 as substantive evidence.

But there is a critical distinction that plaintiff fails to recognize. Evidence that is admitted under MRE 703 is admitted for the limited purpose of providing context to the expert's opinion, "thereby enabling the trier of fact *to determine the weight due* an expert's opinion." *People v Pickens*, 446 Mich 298, 335; 521 NW2d 797 (1994) (emphasis added). Regarding the purpose of MRE 703, our Supreme Court stated that uncovering the evidence on which the expert based his opinion

> is essential to enable other experts to determine whether the opinions expressed by the witness are correct, and to contradict them if wrong. Most importantly, without examination of the foundation of the opinion, the factfinders' evaluation *of the relative value of the opinions* offered is necessarily circumscribed and the reliability of its ultimate determination correspondingly compromised.
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> Simply stated, the "*probative value of an opinion of sanity* depends on the facts upon which it is based." *People v Murphy*, 416 Mich 453, 465; 331 NW2d 152 (1982). [*Dobben, supra* at 697; emphasis added.]

Given the limited purpose for which this evidence is considered, we find that it is properly characterized as impeachment evidence, not substantive evidence.

"Substantive evidence" is defined as evidence that is "adduced for the purpose of proving a fact in issue, as opposed to evidence given for the purpose of discrediting a witness." Black's Law Dictionary (6th ed), p 1429. Although defendant's sanity was at issue in this case, Dr. Shazer's report was not being used to *prove* defendant was sane, but rather to refute the credibility of Dr. Lewis' opinion. This is because a defendant is presumed sane, *People v Murphy*, 416 Mich 453, 463; 331 NW2d 152 (1982), and the burden is on the defendant to prove by a preponderance of the evidence that he is insane, MCL 768.21a(3). The prosecution is not required to prove the defendant's sanity. See *People v McRunels*, 237 Mich App 168, 172-173;

603 NW2d 95 (1999). Therefore, we hold that the trial court erred in admitting the information contained in Dr. Shazer's report as substantive evidence.

This same analysis would apply to the other statements contained in the various doctors' and nurses' reports and notes had defendant's expert used them as a basis for his opinion. But Dr. Lewis admitted at trial that he either did not rely on this information or did not even read it. Therefore, MRE 703 is not applicable.

We must then determine if another avenue existed for defendant's statements to be admitted as substantive evidence. This issue is typical when evidence contained in a medical report is sought to be admitted at trial as substantive evidence, one of hearsay within hearsay. As our Supreme Court stated in *Merrow v Bofferding*, 458 Mich 617, 626; 581 NW2d 696 (1998), when a medical report of a doctor is introduced by itself, there are two levels of hearsay present: (1) the document itself (because the report is used to prove the statement was made); and (2) the actual statements contained in the document. Each level of hearsay must either fall under a hearsay exception or be properly characterized as nonhearsay in order for the evidence to be admitted as substantive evidence. *Id*. at 626-627.

In this case, the prosecutor did not seek to admit the documents into evidence because he mistakenly believed that only defendant's statements needed to be admitted and that their admission was proper under MRE 703. The court recognized that MRE 703 was not the applicable evidentiary rule, but admitted defendant's statements as substantive evidence under MRE 803(4), the hearsay exception for statements made for the purpose of medical diagnosis or treatment.[1] Thus, the trial court also failed to realize that the documents themselves had to be properly admitted. The medical notes appear to have been admissible under MRE 803(6), which provides an exception to the hearsay rule for records of regularly conducted activity, commonly known as the business records exception. See *Merrow, supra* at 627. However, because the prosecutor laid no foundation for the documents' admission under this exception, the documents remained hearsay. Therefore, the trial court erred in admitting defendant's statements without requiring that the documents the statements were contained in be admitted into evidence.

But such errors of this nature only require reversal where "it is more probable than not that a different outcome would have resulted without the error." *Lukity, supra* at 495. Here, defendant's sanity was the main issue at trial. The court specifically noted in its ruling that Dr. Shazer's report and defendant's statements in the other various reports were admitted as substantive evidence and appears to have relied on this evidence in determining the issue of defendant's sanity, though to what degree is uncertain. Under these circumstances, we find that the trial court committed error requiring reversal because we cannot say that it is more probable than not that these errors were not outcome determinative. Accordingly, we do not reach

[1] The trial court stated that the evidence might also be admissible as statements made by a party opponent, MRE 801(d)(2). Defendant concedes on appeal that his statements contained in these records were nonhearsay under MRE 801(d)(2). We note, however, that several of the statements defendant points out on appeal are not in fact statements by defendant at all, but rather are observations by medical personnel that arguably do not fall under the hearsay exception MRE 803(4).

defendant's other issue on appeal regarding whether the trial court erred in concluding that defendant did not prove his insanity by a preponderance of the evidence.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ David H. Sawyer
/s/ Stephen L. Borrello